Arbitrating Illness & Disability Cases

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1. Introduction

The arbitration of illness and disability grievances raises complex issues for both unions and employers. No longer can these cases be confined to the law of industrial relations. In many instances arbitrators are called upon to interpret and apply human rights legislation, the *Charter of Rights and Freedoms*, and other legislation addressing individual rights.

There is a variety of ways in which illness and disability issues can come before an arbitrator:

- Determining whether or not an employee is entitled to sickness or disability benefits.
- Determining whether or not an employee was justly disciplined for alleged abuse of the sick leave plan.
- Determining the degree of disability so that the issue of accommodation can be determined.
- Determining whether an employee can be terminated due to non-culpable absences.

This paper seeks to alert the labour practitioner to some of the procedural, jurisdictional, and substantive changes to the law that have an impact on the arbitration of disability grievances. It will also attempt to give some practical advise to both management and union presenters on how to best present this type of evidence.

2. What is the arbitrator's jurisdiction to resolve disputes about disability benefits?

The newest and most interesting issue in disability arbitrations is the proper forum for resolving grievances concerning eligibility for short- and long-term disability benefits. Prior to the Supreme Court of Canada's decision in ***Weber v. Ontario Hydro*** (1995) 125 DLR (4th) 583, arbitrators consistently held they had no jurisdiction to address issues of eligibility for benefits unless the terms of the insurance plans were in whole or in part incorporated into the collective agreement.

In these situations the Employer is the ultimate insurer under the plan and it is irrelevant what the insurance company or other plan administrator may decide: ***Re: Canada Safeway Ltd. and UFCW, Local 1518*** (1995) 52 LAC (4th) 295 (Hope, QC), ***Re: Coca Cola Bottling and UFCW*** (1994) 44 LAC (4th) 151 (Swan), ***Re: Dominion Tanners and UFCW, Local 832*** (1996) 56 LAC (4th) 392 (Hamilton), and ***Re: Medicine Hat Catholic Church Board of Education and Alberta Teachers' Federation*** (1996) 60 LAC (4th) 103 (Moreau).

Some arbitrators in Ontario have interpreted the Court's decision in *Weber v. Ontario Hydro* as broadening the scope of an arbitrator's jurisdiction to include any case where the employee's right to benefits stems from the collective agreement. In ***Honeywell Limited and CAW - Canada*** (1997) 65 LAC (4th) 37 (Mitchnick), ***Re: Corporation of the City of Hamilton and CUPE, Local 167*** (1998) 66 LAC (4th) 129 (Beck), and ***Stone Consolidated Ltd.,*** Unreported January 15, 1997 (Rayner), the arbitrators have applied a □but for□ test to determine whether the grievance is arbitrable. Regardless of the terms of the collective agreement, the dispute falls within the exclusive jurisdiction of the arbitrator if □but for□ the agreement the grievor would have no claim for benefits under the insurance plan. These arbitrators concluded this broad test was mandated by the Ontario Court of Appeal's decision in ***Pilon v. International Minerals and Chemical Corporation (Canada) Ltd.*** (1996) 31 OR (3d) 210**.** The Ontario Court of Appeal, in turn, relied on *Weber v. Ontario Hydro*.

In *Pilon v. IMCC* the Court found that a claimant for disability insurance was required to address a denial of benefits through the grievance\arbitration provision of the collective agreement. Pursuant to the terms of the collective agreement IMCC administered the plan and determined issues of eligibility. While all parties agreed the claim could be brought under the collective agreement, the claimant argued she had the option of pursuing the insurer in court. Relying on *Weber v. Ontario Hydro* the Court of Appeal said the arbitrator had exclusive jurisdiction because the dispute concerned matters governed by the collective agreement. It is important to note that this case did not involve a dispute between the Union and the E, rather it was between the injured worker and the insurer. Moreover, it was the insurance company who took the position that the matter should be before an arbitrator, not in the Courts.

The decision of arbitrator Mitchnick in *Honeywell* was recently overturned in the Divisional Court on October 7,1998 in a 2 page decision by Justices Bell, Sharpe and McKinnon (see ***Sun Life Assurance Company v National Automobile, Aerospace, Transportation and General Workers of Canada*** [1998] O.J. 3995). The Court held that the insurer could not be made a party to the arbitration without its consent and quashed that part of the Mitchnick award**.** The Court indicated that the test as to whether or not the arbitrator had jurisdiction to determine eligibility to insured benefits depended on how the case fit into the four traditional categories identified in *Brown and Beatty, Canadian Labour Arbitration* at section 4:1400. These categories are as follows:

1. Where neither the plan or the benefit is mentioned in the Collective Agreement. In these situations the arbitrator has no jurisdiction to determine eligibility to benefits.
2. Where the Collective Agreement simply provides for the benefit, the grievance procedure is the proper avenue for resolving eligibility disputes.

3. Where the Collective Agreement simply provides for the employer to pay the insurance premium, the workers' remedy is against the insurer directly. In this case the worker is obligated to use the Court process, not the arbitration.
4. Where the insurance policy is incorporated into the Collective Agreement, the worker must use the arbitration process and the employer is liable for the breach.

The decision in ***Honeywell*** or ***Sun Life*** is presently the subject of an application for Leave to Appeal before the Ontario Court of Appeal.

3. Is post-discharge evidence admissible in non-culpable dismissals?

Prior to the decision of the Supreme Court of Canada in ***Cie miniere Quebec Cartier v. Quebec*** (1995) 125 DLR (4th) 577, there were two schools of thought among arbitrators in regard to the date for determining the employee's prognosis for regular attendance in the future. Those arbitrators who supported the date of dismissal as the proper time for determining this issue argued the employer is entitled to some finality in the employment relationship: ***Re: City of Sudbury and CUPE, Local 207*** (1981), 2 LAC (3d) 161 (Picher), ***Re: Ottawa General Hospital and CUPE, Local 1657*** (1985) 20 LAC (3d) 24 (Brown), and ***Re: Sonco Steel Tube Division Ferrum Inc. and USWA*** (1990), 13 LAC (4th) 414 (Brown).

Other arbitrators argued the time for determining the future potential of an employee is at the date of the hearing. Because the cause for dismissal is non-culpable the employee's post discharge rehabilitation efforts are relevant and any potential prejudice to the employer can be accommodated by reinstating the employee on conditions and without back pay: ***Re: Canada Post Corporation and Canadian Union of Postal Workers*** (1982) 6 LAC (3d) 385 (Burkett) and ***Re: Schlumberger Industries and IAM, Lodge 1755*** (1991) 22 LAC (4th) 394 (Dissanayake).

A third approach is found in ***Re: Raven Lumber Ltd. and IWA Local 1-363*** (1986), 23 LAC (3d) 357 (Munroe, QC)**.** In this case the arbitrator held that where the employer has genuinely treated the illness as non-culpable, allows the employee reasonable time to confront the problem, and assists the employee in to rehabilitate, it is reasonable to consider future potential at the time of the discharge.

If the employer has not made these efforts the proper time for assessing future employment is at the date of the hearing.

In *Quebec Cartier* the grievor was discharged for excessive absenteeism due to alcoholism. The employer had been unsuccessful in rehabilitating the grievor while he was employed. After the dismissal the grievor entered a treatment program and by the time of the hearing had recovered from his illness. The arbitrator found the discharge to be just and reasonable at the time; however, the post discharge evidence led him to reinstate. The Court reversed the award concluding that the time for determining whether there is sufficient cause for termination is at the date of dismissal and there is no basis for altering this rule for cases based on alcoholism. While the Court said that post discharge evidence may be admissible in some circumstances, it seemed to limit these circumstances to where the arbitrator is looking at the reasonableness and appropriateness of the decision under review at the time the decision was implemented.

Since *Quebec Cartier* arbitrators in different provinces have distinguished the decision on various grounds. Arbitrator Shime distinguished *Quebec Cartier* in ***Canada Post Corporation*** Unreported (January 19, 1996) based on the different statutory powers accorded arbitrators under Section 60(2) of the *Canada Labour Code***.** Under this

provision arbitrators have jurisdiction to substitute a lesser penalty even where the employer has just cause at the time of the dismissal.

The same result occurred in ***Bell Canada*** Unreported (September 22, 1995)(Devlin) and ***Bell Canada*** (1996) 58 LAC (4th) 1 (Dissanayake).

Similar awards have been rendered by Ontario and Manitoba arbitrators based on their respective legislative provisions: ***Corporation of the City of Toronto*** (1996) 52 LAC (4th) 118 (Haefling), ***Province of Manitoba*** (1996) 52 LAC (4th) 186 (Freedman).

The section relied upon in the Ontario cases is section 48 (17) of the Labour Relations Act which allows an arbitrator to lessen the penalty in a just cause situation.

However, in the case of a non-culpable discharge, there is no finding of just cause and the discharge is not a penalty. Instead it is recognition of the Employers common law right to declare the employment agreement frustrated due to the remote chance that the employee will be able to attain a reasonable level of attendance in the future. Therefore, I believe that one could still argue that in cases of non-disciplinary discharges, evidence of post dismissal evidence is inadmissible, because of the reasoning in the *Quebec Cartier* decision.

In British Columbia there is a divergence of views. In ***Re: Alcan Smelters and Chemicals Ltd. and CAW, Local 2301*** (1996) 55 LAC (4th) 261 (Hope, QC) the arbitrator found *Quebec Cartier* is consistent with existing arbitral authorities. Hope concluded that post discharge evidence is always admissible if it calls into question the employer's projection, at the time of dismissal, that the employee will not be capable of regular attendance in the future. This view is shared by Arbitrator Taylor, QC in ***Quintette Operating Corporation and United Steel Workers of America*** (1996) 57 LAC (4th) 356. Taylor said that post dismissal evidence of rehabilitation is admissible if it is relevant to the facts in issue at the time of the dismissal. See, also ***Re: Mitchell Island Forest Products Ltd. and IWA, Local 1-217*** (1997) 60 LAC (4th) 73 (Blasina) and ***Re: School District No. 39 (Vancouver) and IUOE*** (1998) 66 LAC (4th) 135 (Glass).

Arbitrator Germaine expresses another point of view in ***Westmin Resources Limited and CAW, Local 3019*** Unreported (April 28, 1997). In this award Germaine says the entire scheme of the *Labour Relations Code* and the tests set out in ***Wm. Scott & Co. Ltd.*** contemplate a consideration of post dismissal evidence. This award, however, was reversed by the BC Labour Relations Board ***[BCLRB LD. No. B335\97]*** which held that the Quebec labour legislation could not be distinguished from the BC Code making *Quebec Cartier* applicable to arbitrations in this province. The Board, however, upheld the approach taken by Arbitrator Munroe, QC in ***Re: Raven Lumber, supra*** as consistent with ***Quebec Cartier.***

The following two cases serve to illustrate the after effect of the *Quebec Cartier* decision:

Quebec Cartier does not preclude the admission of medical reports made after the dismissal because such reports are not subsequent event evidence: ***Re: Peel Memorial Hospital and Service Employees International Union, Local 204*** (1996) 52 LAC (4th) 254 (Howe).

A commitment to treatment made prior to the dismissal must be taken into account in an alcohol or drug addiction case even if it means an arbitrator will consider post discharge evidence of rehabilitation: ***Re: Great Atlantic and Pacific of Canada Ltd. and Retail Wholesale Canada*** (1998) 65 LAC (4th) 306.

4. What governs the use of medical experts and reports in an arbitration addressing illness or disability?

Arbitrators have power to admit medical reports, without requiring that the doctor who prepared the report be called as a witness, in the exercise of their discretion to accept evidence (Section 48 (12) (f) of the *Labour Relations Act (Ontario).* The parties must give notice to the other party of their intention to introduce the report and must provide a copy of the report. However, the other party may wish to cross-examine the doctor at the hearing, and arbitrators may accord greater weight to the oral testimony of a doctor who is available and cross-examined, than to a written statement. Absent the opportunity for cross-examination, a report may be entitled to less weight than medical evidence given in person by a doctor.

A few issues to keep in mind:

- Establishing expert qualifications, including education and training, experience, research and publications;

- Degree of familiarity with patient, length of association, ongoing treatment or one assessment;

- Is the doctor a general practitioner or specialist? In some situations, the evidence of a specialist will be preferred. As well, sometimes a specialist s evidence or that of a general practitioner may be preferred over that of an alternative practitioner such as a chiropractor;

- Accommodating the doctor's schedule : doctors often require a good deal of notice of hearing dates in order to be available at the hearing; parties and arbitrators will often allow some latitude in the order of proceedings to accommodate their testimony at a time which is convenient for them.

An issue to keep in mind in regard to both medical reports, and the evidence of doctors and specialists, is the caution to be exercised regarding materials and information sent to expert witnesses prior to preparation of a report. For example, an unreported Ontario Court oral decision of Wilson J. in ***Mihelic v. Simplex Odeon***, December 4th, 1997, illustrates the importance of counsel exercising caution in outlining facts and forwarding them to the doctor. Counsel for the defendant forwarded to the doctor a memorandum outlining the facts and expressing an opinion prepared after discovery. The doctor acknowledged that the report was read by him after he had examined the plaintiff and before he prepared his own report. The judge stated that, in her view, it was very dangerous for counsel to provide any summary of the events prepared from a defence, or from a plaintiff's point of view. Providing such a report risks tainting an expert witness. The judge noted that a doctor is entitled to receive medical reports, documents and to review transcripts. However, a doctor should not, in her view, receive a synopsis brief from the point of view of the retaining party. Consciously or unconsciously, this may taint objectivity.

In ***Re Miracle Food Mart of Canada and U.C.F.W., Locs. 175 & 633***, (1996) L.A.C. (4th), Arbitrator Mitchnick addressed the issue of the admissibility of medical reports and the necessity of the authors' attendance for cross-examination. While acknowledging that arbitrators, and boards of arbitration, are more informal than courts, Mitchnick stated that, they are nonetheless expected to act on evidence having cogency at law. He noted that there are instances, for example qualifying a date or verifying a medical appointment, where the document may be admitted without requiring production of its creator for cross-examination.

However, he went on to state that where the report is of consequence, the arbitrator, in line with natural justice, should allow the opposing side to subject the evidence to cross-examination. On the facts of the case, Mitchnick decided that with the reports being so subjective and germane to the central issue in the case, he would not admit them without having the medical personnel who authored them appear for cross-examination.

It should be noted that there may be restrictions in the collective agreement that determine the relevance of medical opinions. If, for example, the employer is only entitled to a doctor's certificate as a means of verifying the grievor's illness, an expert medical opinion commissioned by the employer, saying that the grievor was not disabled during the absence, may not be admissible to deny payment of sick leave benefits.

In general, all medical reports in the possession of the parties that are potentially relevant to issues in dispute, apart from those prepared in contemplation of litigation and governed by solicitor/client privilege, may be the subject of a production order by the arbitrator. However, the production of medical records or reports in the hands of the third party raises complex issues. Typically these medical records were created for a purpose unrelated to the prosecution of the grievance. As a consequence the arbitrator must balance the right to privacy against the right to a fair hearing. The Supreme Court of Canada has developed a two step test to determine whether the production of private and medical records is justified. The court set out numerous factors that must be taken into account in making this determination. **(*R. v. O'Connor*,** [1995] 4 S.C.R. 411)

The use of medical or other experts in a hearing necessarily complicates the arbitration process and can lead to substantial delays if the parties do not address the potential issues in a pre-hearing meeting. In any case involving expert evidence, consideration must be given to how the evidence will be adduced at the hearing. If you have not provided the other party with sufficient notice of the report, the arbitrator may grant an adjournment of the hearing or simply refuse to consider the evidence out of fairness to the other side. Also, it is important to consider that if you have an expert so will the other party. To prevent the hearing from becoming a battle of experts, the ground rules must be set down by consent or by order of the arbitrator.

Finally, it is worthy to note that experts, as any other witness, must be carefully prepared to give evidence. As counsel, one must be sufficiently knowledgeable in the subject of the opinion to lead the expert in direct examination and more so if one is to carry out an effective cross-examination of an expert.

5. Are investigative reports admissible in an arbitration?

First it must be defined what is meant by an investigation report. For present purposes, an investigation includes expert reports, surveillance reports and investigative reports produced by or for an employer. These various forms of documentation will all have issues specific to their production and use in the context of arbitrations.

Where the employer directs a manager or a third party to investigate the grievor's claim arising out of a disability or illness, the report produced by this individual is hearsay. As hearsay it is admissible at the discretion of the arbitrator under the *Labour Relations Act (Ontario).* In exercising that discretion, the arbitrator must weigh the probative value of the evidence against the potential prejudice to the grievor. Normally an investigative report contains summaries of investigator's opinion in regard to the facts and the issues in dispute. It does not represent evidence of the allegations against the grievor. Thus it is of minimal usefulness to the arbitrator. While such a report may be evidence of the employer's thorough investigation, it is also potentially prejudicial to the grievor. Personally, I would not generally admit the report for the truth of the information asserted unless of course the person who conducted the investigation was called as a witness. The report could then be entered as a recording of his or her observations.

In ***Re British Columbia Institute of Technology and B.C.G.E.U.*** (1995) 47 L.A.C. (4th) 99, Arbitrator Blasina considered an investigation report prepared by a third party at the request of the employer. In completing the report the third party (coincidentally an experienced arbitrator herself) interviewed several people, including former employees. Blasina held that as the report did not satisfy the standards of a juridical process it could not be given confidence equal to those emanating from an adversarial trial process. As such, the report could not be considered material and probative in respect of the issues at hand. Blasina went as far as to say that it was in the interest of justice being seen to be done that the report, which was characterized as being prejudicial, not be considered.

An investigative report prepared by the employer may be inadmissible at the request of the union if it is prepared in contemplation of the hearing because it is clothed with a solicitor/client privilege: ***Re: Liffey Custom Coatings Inc. and London and District Service Workers Union, Local 220*** (1996) 59 L.A.C. (4th) 7 (Williamson).

Statements made during an investigation may also be inadmissible if the investigation is considered to be part of the grievance procedure. In ***Re: Canadian Airlines International Ltd. and CUPE, Airline Division*** (1992) 27 L.A.C. (4th) 311 (Springate) evidence surrounding an investigation meeting with the grievor prior to the imposition of discipline was admissible because it was not part of the grievance process and did not involve settlement discussions.

6. Admissibility of Video Tape Surveillance

The admissibility of an investigation into the bona fides of the employee's absence may also be questioned when it includes evidence of surveillance.
The typical example of this is where the employer engages a private investigator to undertake videotape surveillance of an employee who is on sick leave but is engaging in activities which are inconsistent with the alleged disability. These activities usually involve either working at a secound job while disabled or performing leisure activities inconsistent with the alleged illness.

There are two schools of thought with respect to the admissibility of this type of evidence.

In the first school, virtually all video surveillance evidence is considered to be admissible except in rare circumstances. These circumstances include where privilege is violated or whether the intrusion is so onerous that it offends the sensibilities of the arbitrator. In ***Kimberley Clark Inc. and I.W.A.-Canada, Local 1-92-4***, October 11,1996, Arbitrator Bendel subscribed to the first school, basing his conclusions on section 48(12)(f) of the *Ontario Labour Relations Act*, which provides that an arbitrator has the power to accept such oral and written evidence as the arbitrator, in his discretion considers proper, whether admissible in a court of law or not.

The second school of thought holds that in determining admissibility of video tape evidence, an arbitrator must balance the employee's right to privacy against the employer's right to investigate abuses. The leading case in this area is ***Re: Doman Forest Products and IWA, Local 1-357*** (1990) 13 L.A.C. (4th) 275 (Vickers). In this decision the arbitrator says that when evaluating the admissibility of this type of evidence the employee's right to privacy must be balanced with the employer's reasons for taking such extraordinary steps.

In doing so the arbitrator must ask three questions:

1. Was it reasonable, in all of the circumstances, to request a surveillance?

2. Was the surveillance conducted in a reasonable manner?

3. Were other alternatives open to the employer to obtain the evidence?

An example of this secound approach at work can be seen in the case of a recent decision of Arbitrator Maureen Saltman in *Toronto Transit Commission*. Here, the arbitrator stated that it was necessary to consider whether it was reasonable in the circumstances for the employer to resort to such surveillance at all. In this case, it was held that a mere suspicion of fraudulent conduct on the part of the grievor was insufficient to outweigh the employee's right to privacy. In refusing to admit the video surveillance evidence, the arbitrator specifically referenced the fact that there had been no prior history of fraud or

dishonesty, no previous long-term disability claims and no indication that the grievor was uncooperative in providing medical information or attending medical examinations. This accords with the general arbitral approach to employee privacy.

Where the employer is unable to justify the use of surveillance, an arbitrator has a discretion to refuse its admission in the hearing as part of the authority to regulate the arbitration process and ensure the parties are accorded a fair hearing. Arbitrators are also entitled to interpret and apply provincial legislation relevant to this issue such as the *Privacy Act* of Saskatchewan and the BC *Privacy Act*. No such legislation however exits in Ontario.

Because privacy is now a constitutionally protected right, arbitrators will be vigilant to ensure this right is invaded only where the employer has shown the competing interests are in its favour: ***Re: Toronto Transit Commission and Amalgamated Transit Union*** Unreported (December 21, 1995) (Kennedy); ***Alberta Wheat Pool, supra; Re: Canadian Pacific Railway and Brotherhood of Maintenance of Way Employees*** Unreported (March 15, 1995) (Picher); and ***Air Canada and CUPE*** (February 10, 1995) (Simmons); ***Western Grocers and U.F.C.W., Local 1400*** (unreported, July 14, 1995, Priel), where surveillance evidence was admitted even though obtained by deception; and ***Intercontinental Packers and U.F.C.W., Local 248-P*** (unreported, February 9, 1996, Priel).

Where the parties are governed by the Charter, (for example where the employer is a governmental institution) an arbitrator has an express jurisdiction to exclude evidence obtained in violation of the right to privacy pursuant to Section 24(2). The onus, however, rests with the party asserting the breach of privacy.

7. New Trends and Comments from an Arbitrators Viewpoint

The most dramatic changes involving illness and disability claims are that the issues are more often coming to be dealt with in the arbitration arena and that the legal issues are becoming more complex as we try to balance the rights and interests of employees and employers. The effect of the *Weber* case has greatly expanded the jurisdiction of arbitrators. No longer are arbitrators limited to interpreting and applying just the collective agreement, for now we are required to apply employment standards legislation, human rights codes, privacy legislation, insurance contracts and a myriad of tort claims that used to be the exclusive jurisdiction of the courts. Arbitrators are being called upon to assess damages that go beyond the realm of strictly compensatory damages. Expect to see claims for punitive damages, mental distress and aggravated damages arising from disability claims. If the *Pilon* approach is upheld, expect to employers being hit with bad faith claims for wrongfully denying legitimate disability claims. This in turn will put pressure on employers to insist that their insurers agree to participate in the arbitration process if they want to keep their business. This will also bring a new breed of lawyers into the labour arbitration world; the personal injury lawyer. Unions will insist that their regular labour lawyers become expert in the area of disability claims or they too will seek out specialized legal counsel to represent them in arbitration.

At the same time as the jurisdiction of arbitrators is expanding, the parties are looking at other forms of dispute resolution to solve disputes such as disability and illness claims. Therefore I believe that you can expect to see more mediation and mediation/arbitration of claims of this nature.

As the stakes get higher for the parties, so will their dependence on expert medical evidence. Gone will be the days when the grievors' general practitioner is the only doctor to testify. Now each party will be compelled to call their own specialist in an endless battle of the experts. This will further legalize the arbitration process, resulting in both longer and more expensive arbitration proceedings.

The influence of the Human Rights Code and the Charter on disability claims is bound to be felt for years to come. The effect of these laws will be that the agreed terms of the Collective Agreement will be irrelevant if the provisions are found to be in violation of either the Code or the Charter. If an arbitrator were to find that a provision in a Collective Agreement violated the Code, then fashioning the proper remedy becomes of the utmost importance. Does one unilaterally add benefits to those employees found to be discriminated against, or does one take away the benefit from the favoured group? Is it fair to saddle only one party with the costs of an illegal agreement when it took two to come to that agreement in the first place? Should the arbitrator instead order the parties to renegotiate an agreement that complies with the Code so that the parties can make the appropriate bargaining decisions?

These and other fascinating questions and issues will make the next decade an exciting one for all members of the labour relations community.